

A Green Prospect Sdn Bhd v King Ong Development Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
A-02(NCVC)(W)-1858-09 OF 2017
HAMID SULTAN, HASNAH HASHIM AND HARMINDAR SINGH
JJCA
10 JULY 2018

C *Contract — Claim — Overpayment — Claim for overpayment under contract
entered into between parties — Whether contract was lump sum contract
— Whether re-measurement was intended by parties — Whether there were
progressive payments made during duration of contract — Whether claim ought to
be allowed*

D The appellant ('the defendant'), owner of three pieces of land, appointed the
respondent ('the plaintiff') as the contractor to construct factory comprising of
Blocks C, D, E and F to manufacture rubber gloves on the said land ('the
E works'). The plaintiff gave a quotation in the amount of RM49,680,000 ('the
quotation') and the defendant accepted the same. The defendant then issued a
purchase order together with a set of building plans approved by the Majlis
Perbandaran Manjung ('the PO'). The expected completion date was
August 2014. However, sometime in August 2014, the raw water treatment
F collapsed which resulted in the delay of the intended startup date for
production. The plaintiff forwarded letters of delivery of vacant possession in
respect of certain works to the defendant. The defendant refused to take
delivery of vacant possession as defect were discovered and requested the
plaintiff to list the incomplete works as well as defective items. The plaintiff
G issued another letter of delivery of vacant possession but this was again rejected
by the defendant. Sometime in January 2015, the defendant appointed a
quantity surveyor ('the QS') to conduct a site re-measurement of the works
carried out by the plaintiff to ascertain the actual amount payable. The plaintiff
was given a copy of the report to review and analyse. However, the plaintiff
H disputed the value of works and proceeded to commence a suit against the
defendants for amounts unpaid in the sum of RM4,266,490.17. The
defendant counterclaimed for the sum of RM2,130,640.33 as overpayment
made to the plaintiff. The High Court judge ('the HCJ') concluded that the
I contract entered into between the parties was a lump sum contract and not a
re-measurement contract. Therefore, the HCJ allowed the plaintiff's claim and
dismissed the defendant's counterclaim. Hence, the present appeal.

Held, allowing the appeal with costs:

- (1) If there are progress payments made, the contract could not be a lump sum contract. Based on the documents issued by the plaintiff, the parties had in fact re-measured the works done. Progress payments were also made to the plaintiff and this was not disputed. Based on both oral and documentary evidence, the contract was clearly not a lump sum contract, in view of the provision for progress payments (see paras 24, 33 & 37). A
- (2) The quotation and the PO formed the foundation of the contractual relationship between the plaintiff and the defendant. The presence of the words 'P/s: Suggestion for item 1–23 any different amount on the job, will be re-measured again' in both the documents, cemented the re-measurement arrangement agreed to by the parties (see para 40). B
- (3) The HCJ erred in failing to consider the contemporaneous evidence and the surrounding circumstances, as well as disregarding the defendant's QS report. The HCJ erred when he failed to consider that the parties had, throughout the duration of the contract, regarded the contract to be on re-measurement basis. Furthermore, the plaintiff failed to adduce evidence to challenge or rebut the re-measurement findings by the defendant's QS (see para 41). C

[Bahasa Malaysia summary]

Perayu ('defendan'), pemilik tiga bidang tanah, melantik responden ('plaintif') sebagai kontraktor untuk membina kilang yang terdiri daripada Blok C, D, E dan F untuk mengeluarkan sarung tangan getah atas tanah tersebut ('kerja'). Plaintif memberikan sebut harga berjumlah RM49,680,000 ('sebut harga') dan defendan menerimanya. Defendan kemudian mengeluarkan pesanan belian bersama-sama dengan satu set pelan bangunan yang diluluskan oleh Majlis Perbandaran Manjung ('PO'). Tarikh dijangka siap adalah Ogos 2014. Walau bagaimanapun, kira-kira Ogos 2014, rawatan air mentah runtuh, mengakibatkan kelewatan tarikh permulaan untuk pengeluaran. Plaintif menghantar surat penyerahan milikan kosong berkenaan dengan kerja tertentu kepada defendan. Defendan enggan menerima milikan kosong kerana kecacatan ditemui dan meminta plaintif menyenaraikan kerja-kerja yang tidak lengkap serta barang-barang yang cacat. Plaintif mengeluarkan satu lagi surat penyerahan pemilikan kosong tetapi ini sekali lagi ditolak oleh defendan. Kira-kira Januari 2015, defendan melantik juruukur kuantiti ('QS') untuk melakukan pengukuran semula tapak bagi kerja-kerja yang dijalankan oleh plaintif untuk menentukan amaun sebenar yang perlu dibayar. Plaintif diberi salinan laporan untuk mengkaji semula dan menganalisisnya. Walau bagaimanapun, plaintif membantah nilai kerja dan meneruskan saman terhadap defendan untuk amaun yang tidak dibayar berjumlah RM4,266,490.17. Defendan mengaku tuntutan sebanyak RM2,130,640.33 sebagai lebihan bayar yang dibuat kepada plaintif. Hakim Mahkamah Tinggi ('HMT') menyimpulkan bahawa kontrak yang ditandatangani oleh pihak-pihak adalah kontrak sekaligus dan bukan kontrak pengukuran semula. D

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- A Oleh itu, HMT membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

- B (1) Sekiranya terdapat bayaran progresif dibuat, kontrak ini tidak boleh menjadi kontrak sekaligus. Berdasarkan dokumen yang dikeluarkan oleh plaintif, pihak-pihak sebenarnya telah mengukur semula kerja-kerja yang dilakukan. Bayaran progresif juga dibuat kepada plaintif dan ini tidak dipertikaikan. Berdasarkan kedua-dua bukti lisan dan dokumentar,
- C kontrak itu jelas bukan kontrak sekaligus, memandangkan terdapat peruntukan untuk pembayaran progresif (lihat perenggan 24, 33 & 37).
- D (2) Sebut harga dan PO membentuk asas hubungan kontrak antara plaintif dan defendan. Kehadiran perkataan-perkataan 'P/s: Suggestion for item 1–23 any different amount on the job, will be re-measured again' dalam kedua-dua dokumen, mengukuhkan persetujuan pengukuran semula antara pihak-pihak (lihat perenggan 40).
- E (3) Hakim Mahkamah Tinggi terkhilaf kerana gagal mempertimbangkan bukti yang semasa dan hal keadaan sekelilingnya, serta tidak menghiraukan laporan QS defendan. Beliau terkhilaf apabila gagal mempertimbangkan bahawa pihak-pihak telah, sepanjang tempoh kontrak, menganggap kontrak atas asas pengukuran semula. Selain itu, plaintif gagal mengemukakan keterangan untuk mencabar atau menyangkal penemuan pengukuran semula oleh QS defendan (lihat perenggan 41).]
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Notes

- G For cases on claim in general, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4461–4484.

Cases referred to

- Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation & Ors* [2015] MLJU 577, FC (refd)
- H *Ming & Co v Leong Ping Ching* [1964] 1 MLJ 312 (refd)
- Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308, FC (refd)
- Usima Sdn Bhd v Lee Hor Fong* [2017] 5 MLJ 273, FC (refd)

Appeal from: Civil Suit No AA-22NCVC-63–04 of 2016 (High Court, Ipoh)

- I *Gopal Sri Ram (Eddie Chuah, Chong Ker Ling, David Yii and Damien Chan with him) (Wong & Partners) for the appellant.*
- CK Yeoh (Navpreet Singh, Steven Su, CF Lau and Kelvin Ding with him) (KS Su & Mah) for the respondent.*

Hasnah Hashim JCA (delivering judgment of the court):**A**

[1] This is an appeal by the appellant (the defendant in the High Court) against the decision of the High Court dated 21 August 2017 made after a full trial, which allowed the plaintiff's claim for the sum of RM4,266,490.17 together with interest at the rate of 5%pa on the judgment sum calculated from the date of the writ until the date of full realisation and costs against the defendant. The defendant's counterclaim for overpayment of RM2,120,640.33 based on re-measurement was dismissed.

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[2] We heard this appeal on 8 May 2018 and reserved our decision. After perusing the records of appeal, the written submissions filed by the respective learned counsel and upon hearing learned counsel, we adjourned the matter for our consideration and decision.

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[3] We now give our decision and the reasons for the same.

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[4] For ease of reference in this judgment the parties will be referred to as the defendant and plaintiff respectively.

E**THE RELEVANT FACTS**

[5] The relevant facts in the instant appeal are not complicated. The salient facts can be summarized as follows. The defendant owns three pieces of land located at Lumut Industrial Park, Lumut, Perak ('the said land'). The defendant appointed the plaintiff as the contractor to construct factory comprising of Blocks C, D, E and F to manufacture rubber gloves on the said land ('the works').

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[6] The plaintiff gave a quotation dated 22 February 2013 of RM49,680,000 which was accepted by the defendant ('the quotation'). Upon the acceptance of the quotation the defendant subsequently issued purchase order No 14-00547 dated 15 May 2013 together with a set of building plans approved by the Majlis Perbandaran Manjung ('the PO'). The parties also issued further quotations and/or purchase orders for additional items/variation works which were outside the scope of the terms said PO. The expected completion date was August 2014.

G**H**

[7] The plaintiff also issued credit notes as well as deductions to the invoices to the defendant whenever there were overcharges due to discrepancies in the quantities of work done upon re-measurement. Sometime in August 2014 the raw water treatment collapsed which resulted in the delay of the intended startup date for production.

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- A** [8] The plaintiff vide email dated 21 August 2014 forwarded letters of delivery of vacant possession dated 20 August 2014 in respect of certain items of work to the defendant. However, the defendant refused to take delivery of vacant possession as defects were discovered and requested the plaintiff to list the incomplete works as well as defective items. The plaintiff issued a letter of delivery of vacant possession again dated 3 October 2014. This was in fact partial handing over of the works as the plaintiff was still continuing work on the site. The plaintiff issued progress claim No 10 dated 19 January 2015. The defendant rejected the aforesaid progress claim as there were still uncompleted works. The works pursuant to the PO was finally completed sometime in June 2015.

- D** [9] The facts above which included the claim for additional works are not in dispute. The main issue and figures in dispute between the plaintiff and the defendant can be summarised as follows:

Description	Defendant's Position	Plaintiff's Position
Over-invoiced value	RM4,363,296	Lump Sum
Non-compliance	RM1,387,012.20	Practical Completion
E Omission	RM2,378,332.10	RM1,731,509.80
TOTAL	RM8,128,640.30	RM1,731,509.80
Plaintiff's Claim		RM4,266,490.17
Defendant's Claim	RM2,120,640.33	

- F** [10] Sometime in January 2015 the defendant appointed a quantity surveyor ('QS') to conduct a site re-measurement of the works carried out by the plaintiff to ascertain the actual amount payable. The QS prepared two reports as follows:

- G** (a) a report dated August 2015; and
(b) supplementary report dated February 2017 ('the QS reports').

- H** [11] The plaintiff was given a copy of the report dated August 2015 to review and to analyse the said report. The plaintiff, however disputed the value of works as a result of the re-measurement by the QS and issued a demand letter to the defendant. The plaintiff then proceeded to commence the suit against the defendant for amounts unpaid in the sum of RM4,266,490.17.

- I** [12] The defendant counterclaimed the sum of RM2,130,640.33 as overpayment made to the plaintiff based on the QS's reports.

THE HIGH COURT'S FINDINGS

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[13] Two issues were identified by the learned judge as follows:

- (a) the nature of the contract between the parties; and
- (b) the scope of specification of the contract on the execution of contractual work by the defendant and the payment.

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[14] The High Court, after a full trial and having analysed the evidence sustained the claim of the plaintiff. In the grounds of judgment, the learned judge gave his reasons why he found the plaintiff's case proved on a balance of probabilities. After considering the evidence, the learned judge concluded that the contract entered between the parties is a lump sum contract and not a re-measurement contract. Since it is a lump sum contract the learned judge dismissed the counterclaim by the defendant.

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OUR ANALYSIS AND DECISION

[15] Learned counsel for the defendant submitted that the learned judge had fundamentally erred when he determined that the contract is a lump sum contract as the contemporaneous evidence show that the parties had acted on a re-measurement basis. There were overwhelming contemporary documents such as the purchase orders, the quotation, invoices and credit notes issued which showed that the parties had acted on a re-measurement basis and the final amount payable was to be determined based on the re-measurement of the actual work done.

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[16] The trial judge accepted and relied on the oral evidence of one witness Koh Boh Soon ('SP1') as well as a purchase order issued by a non-party to the suit to conclude that it is a lump sum contract despite accepting the evidence that there was re-measurement term. It was further argued by learned counsel for the defendant that having ruled that it is a lump sum contract the learned High Court judge disregarded all the other evidence before him in particular the evidence of the QS on the actual work done.

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[17] The plaintiff failed to adduce any rebuttal evidence to challenge the re-measurement findings made by the QS but instead engaged a QS to re-measure the works done based on drawings before the trial commenced. It was however, not disputed that the plaintiff's QS did not conduct a physical re-measurement of the works.

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[18] The thrust of the defendant's appeal is that the learned judge erred in fact and law in holding that the contract executed is based on a lump sum basis. His Lordship failed to consider that based on the expert evidence there was

A evidence of actual re-measurement of the factory blocks contracted and thus there was in fact an overpayment to the plaintiff by the defendant.

B [19] In our view, the central issue in this appeal relates to the following question. That is, whether the parties had agreed to carry out the works based on a lump sum or a re-measurement basis. The parties did not execute a formal written contract, but relied on the terms of the quotation, the PO as well as other documents such as POs, invoices and credit notes issued and the expert reports to support their respective claims.

C LUMP SUM CONTRACT AND RE-MEASUREMENT CONTRACT

D [20] In our judgment before we examine the learned High Court judge's reasons for his decision we feel that it would be useful to look at the two types of construction contracts and the distinctive features of the said contracts.

Lump sum contract

E [21] In a lump sum contract the contractor undertakes to carry out the specified defined works with approved construction drawings for a fixed sum. The main characteristic of a lump sum contract is that the contractor generally isn't required to provide a detailed breakdown of costs and expenses even though there is a bills of quantities (BQ). A lump sum contract may be used where the contractor is able to provide an accurate estimate of the costs of the project, including the schedule and the scope of the entire project. When a project is well defined in respect of the scope and schedule of the project and clear at the time of tendering, changes, if any, are unlikely or minimal in a lump sum contract. In such a contract the contractor from the commencement of the works is able to accurately price the risk they are being asked to accept.

G [22] The Federal Court in *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation & Ors* [2015] MLJU 577 explained that under a lump sum contract:

H ... price is agreed upon by parties before the works begin. In a lump sum construction contract, it is a single whole construction contract as opposed to a divisible contract. The *Major Law Lexicon* (by P Ramanatha Aiyar), 4th Ed Vol 4 defines a lump sum contract as a type of contract under which the contractor agrees to undertake and complete constructional works for a given price, and if costs exceed price, the loss is borne out by the contractor. If the extra work carried out is with the principal's approval (subject to any extra conditions) that extra cost may be recoverable. (*Sharpe v San Paolo Railway Company* (1873) LR Ch App 597; *Coker v Young* (1860) 2 F & F 98).

I [51] When discussing the issue of extra payments, *Keating on Construction Contracts* (9th Ed) at p 105 wrote:

A lump-sum contract is a contract to complete a whole work for a lump sum eg to build a house for £60,000. If the house is completed in every detail required by the contract the contractor is entitled to £60,000. And if extra work was carried out it may be able to recover further payment.

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[23] In the case of *Ming & Co v Leong Ping Ching* [1964] 1 MLJ 312 the claim was on the basis of quantum meruit for the value of work done by the plaintiffs for the defendant in relation to a contract for the erection of certain additional floors to the back portion of premises. There was no formal written contract between the parties, apart from letters which the parties wrote to each other in connection with the construction work. The issue of whether the contract was a lump sum contract or otherwise was argued. Gill J scrutinised the contemporaneous evidence and concluded:

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The main defence to the claim is that this was a lump sum or an entire contract which was abandoned after a part of the work had been done and that consequently on the authority of *Sumpter v Hedges* [1898] 1 QB 673 the plaintiffs have no right to sue on *quantum meruit*. The answer to that is that in the first place the plaintiffs did not abandon the work, and, in the second place, this was not an entire contract. An entire contract is one in which the entire completion of the work by the contractor is a condition precedent to payment. To my mind, a contract in respect of which progress payments are made from time to time is not an entire or lump sum contract. The payments which were made in this case have been referred to as advance payments, but there is evidence that they bore relation to the work done. The doctrine of *Sumpter v Hedges* therefore, in my opinion, has no application to this case.

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[24] Therefore, if there are progress payments made, the contract cannot be a lump sum contract.

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Re-measurement

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[25] In a re-measurement contract there will be a BQ, that is estimated and not final. In practice the contractor will quote against each BQ item and enter a unit rate or unit price to build up the total contract price on basis of those BQ. The actual contract sum in re-measurement contract cannot be determined when the contract is entered into, but calculated upon completion, based on 're-measurement' of the actual work carried out and the rates tendered. During the construction period, the actual quantity of works executed under each BQ item will be jointly measured and valued at the quoted rate for interim payment purpose. Upon the completion of the contract, the exact quantity of works finally executed under each BQ item will be again re-measured.

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[26] The Federal Court in its judgment in the case of *Usima Sdn Bhd v Lee Hor Fong* [2017] 5 MLJ 273 referred to the learned author of GT Gajira's *Law Relating to Building and Engineering Contracts* in India describing

A re-measurement as ‘more often than not only means re-calculation, and physical measurements or dimension taken on site only occur in relation to work not of its nature subject to calculations of drawings’.

B [27] In *Hudson’s Building and Engineering Contracts* (12th Ed) at para 5-027 it states that:

C The difference between a lump sum contract and a measured contract in this situation lies in the fact that, in the former case, both parties carry the risk of these types’ differences and the price will not alter, whereas in the latter the contract sum will be adjusted, up or down, to take account of the differences.

THE EVIDENCE

D [28] In order to determine whether the agreement between the parties in this instant appeal is based on lump sum or re-measurement the documentary and oral evidence must be carefully examined. The learned judge arrived at his findings that the contract is a lump sum contract based on the following:

- E (a) the PO had repeatedly described the same scope of works and price in the quotation thus the defendant must have agreed to the plaintiff’s offer of scope of works specified at the fixed price;
- (b) in the PO under the column for ‘Quantity’ the words stated were ‘1LS’;
- (c) the POs issued by YTY Industry Sdn Bhd contained the word ‘1L/sum’;
- F (d) accepting the testimony of SP1;
- (e) re-measurement in the postscript refers to any different amount on the job;
- G (f) the defendant had paid the progress claims without objecting or disputing the works; and
- (g) the defendant only appointed the QS to re-measure after the handover in August 2014.

H THE QUOTATION

I [29] The quotation dated 22 February 2013 for the project detailed the works to be carried out was submitted by the plaintiff. It is expressly stated in the said quotation that for items 1–23 ‘... any different amount on the job, will be re-measured’. The defendant subsequently issued a PO dated 15 May 2013 accepting the quotation and expressly reiterating that ‘P/s: Suggestion for item 1–23 any different amount on the job, will be re-measured again’.

[30] Items 1–23 in the quotation are extensively set out as follows:

KING ONG DEVELOPMENT SDN BHD		A
1. BLOCK D		
a) Packing Area: 203' x 140' x 3 1/2 Storey @ RM65.00/sq.ft.	RM 6,465,550.00	B
– Work Include: Ceiling, Floor Tiles, Aluminium Window, Timber & Fire Door, Painting Work (Surface with the Weather shield Only).		
– Work Exclude: Piling Work, Piping Work & Wiring Work.		C
b) Waterproofing Work – for Roof Top Only : 203' x 140' @ RM7.00/sq.ft.	RM 198,940.00	
c) Glove Dipping Lines: 100' x 380' @ RM56.50/sq.ft.	RM 2,147,000.00	D
– Work Include: I-Beam Roofing, Timber Door, Painting Work (Surface with the weather shield Only).		
– Work Exclude: Piling Work, Piping Work & Wiring Work, Marble.		E
d) Machine Footing: 4,320 foot run @ RM27.80	RM 120,096.00	
e) Machine Footing Side Drain: 4,680 foot run @ RM5.00	RM 23,400.00	F
f) Box Culvert 4": 200 foot run @ RM100.00	RM 20,000.00	
g) Marble: 38,000 sq.ft. @ RM7.00	RM 266,000.00	G
h) Scrubber Room: 60' x 100' x 2 1/2 Storey @ RM65.00/sq.ft.	RM 975,000.00	
– Work Include: 2 units Staircase.		
– Work Exclude: Piling Work, Piping Work & Wiring Work.		H
i) Waterproofing Waterproofing Work – for Roof Top Only : 60' x 100' x RM7.00/sq.ft.	RM 42,000.00	
2. WASH ROOM: 33½ x 65' @ RM135.00/sq.ft	RM 285,187.50	I
– Work Include: Wall Tiles, Floor Tiles, Piping Work & Sanitary, Painting Work (Surface with the weather, shield Only).		

A	– Work Exclude: Piling Work, Wiring Work.	
	3. MSB ROOM: 40' x 65' @ RM70.00/sq.ft.	RM 182,000.00
	– Work Include: Internal Drain, Painting Work, Door & Window.	
B	– Work Exclude: Piling Work, Wiring Work.	
	4. CONCRETE SLA: 20' x 65' @ RM31.00/sq.ft	RM 40,300.00
C	5. CHILLER ROOM: 65' x 80' @ RM88.00/sq.ft	RM 457,600.00
	– Work Include: Cooling Stand & 10' x 25' x 10'(Deep) Pond, Painting Work (Surface with the weather shield Only).	
D	– Work Exclude: Piling Work, Piping Work & Wiring Work.	
	a) Waterproofing Work – for Roof Top Only: 65' x 80' x RM7.00	RM 36,400.00
E	6. COMPOUNDING BLOCK: 65' x 160' x 2 Storey @ RM83.00/sq. ft	RM 1,726,400.00
	– Work Include: I – Beam Roof, Ceiling, Aluminium Window, Timber Door, Painting Work (Surface with the weather shield Only)	
F	Production Office: Floor Tiles. LAP: Floor Tiles, Wall Tiles, basin Top.	
	Chemical Store: Floor Tiles, Table Top. Storage Tank: Concrete Slab & 40' (h) I – Beam Roof.	
G	Up stair Office: Door & Window	
	– Work Exclude: Piling Work, Piping Work & Wiring Work.	
H	7. CHOLRINE ROOM: 45' x 60' @ RM65.00/sq.ft.	RM 175,500.00
	– Work Include: Painting Work (Surface with the weather Shield Only)	
	– Work Exclude: Piling Work, Piping Work & Wiring Work.	
I	a) Waterproofing Work – for Roof Top Only: 45' x 60' @ RM7.00/sq.ft.	RM 18,900.00

TOH ROOM (Boiler Block): 100' x 60' @ RM73.00/sq.ft. – Work Include: Smoke Stand Column, Boiler Pipe Stand, Painting Work (Surface with the weather shield Only), I-Beam Roofing. – Work Exclude: Piling Work, Piping Work & Wiring Work.	RM 438,000.00	A
9. TNB SUB-STATION – 20' x 60' @ RM70.00/sq.ft. – Work Include: Internal Drain, Door & Window. – Work Exclude: Piling Work & Wiring Work.	RM 84,000.00	B
10. WASTE WATER UNDERGROUND TANK: 20' x 40' x 10' (deep) @ RM3.10/gallons	RM 155,000.00	C
11. 6 NOS WATER TANK FOOTING & I – BEAM STRUCTURE : 40' x 60' x 50' (h) – Work Include: 3 units Pump House 10' x 27' x 8' (h), 3 units Underground Water Pond 10' x 30' x 10' (d), Painting Work (Surface with the weather shield Only). – Work Exclude: Piling Work, Piping Work, Wiring Work, 6 nos Water Tank.	L/SUM RM 592,250.00	D
12. BLOCK E a) Packing Area: [(128' x 140')-(110' x 28')] x 3 1/2 Storey @ RM65.00/sq.ft. – Work Include: Ceiling, Floor Tiles, Aluminium Window, Timber & Fire Door, Painting Work (Surface with the weather shield Only). – Work Exclude: Piling Work, Piping Work & Wiring Work.	RM 3,376,100.00	E
b) Waterproofing Work – for Roof Top Only [(128 x 140')-(110' x 28')] x RM7.00/sq.ft.	RM 103,880.00	F
c) Glove Dipping Lines : 100' x 380' @ RM56.50/sq.ft. – Work Include : I-beam Roofing, Timber Door, Painting Work (Surface with the weather shield Only). – Work Exclude : Piling Work, Piping Work, Wiring Work, Marble.	RM 2,147,000.00	G
d) Machine Footing : 4,320 foot run @ RM27.80	RM 120,096.00	H
		I

A	e) Machine Footing Side Drain : 4,680 foot run @ RM5.00	RM 23,400.00
	f) Box Culvert 4": 200 foot run @ RM100.00	RM 20,000.00
B	g) Marble : 38,000 sq.ft. @ RM7.00	RM 266,000.00
	h) Scrubber Room : 60' x 100' x 2 1/2 Storey @ RM65.00/sq.ft.	RM 975,000.00
C	– Work Include : 2 units Staircase.	
	– Work Exclude : Piling Work, Piping Work & Wiring Work.	
D	i) Waterproofing Work – for Roof Top Only : 60' x 100' x RM7.00/sq.ft.	RM 42,000.00
13. BLOCK F		
E	Main Office : 100' x 140' x 3 1/2 Storey @ RM65.00/sq.ft	RM 3,185,000.00
	– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Wash Room, Painting Work Painting Work (Surface with the weather shield Only)	
F	– Work Exclude : Piling Work, Piping Work & Wiring Work.	
	b) Waterproofing Work – for Roof Top Only : 100' x 140' x RM7.00/sq.ft	RM 98,000.00
G	c) Main Office & Store : 100' x 150' x 2 1/2 Storey @ RM65.00/sq.ft.	RM 2,437,500.00
	– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Wash Room, Painting Work & Staircase.	
H	– Work Exclude : Piling Work, Piping Work & Wiring Work.	
I	d) Waterproofing Work – for Roof Top Only : 100' x 150' x RM7.00/sq.ft	RM 105,000.00
	14. CANTEEN & STORE : 100' x 260' x 2 Storey @ RM67.00/sq.ft.	RM 3,484,000.00

– Work Include : Floor Tiles, Ceiling, Kitchen Wall Tiles & Floor Tiles, Basin Top, Wash Room, Painting Work (Surface with the weather shield Only), I – Beam Roofing & Staircase.		A
– Work Exclude : Piling Work, Piping Work & Wiring Work.		B
15. BLOCK C		
a) Finished Goods Store : [(128' x 140') - (110' x 28')] x 3 1/2 Storey @ RM65.00/sq.ft.	RM 3,376,100.00	C
– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Staircase, Painting Work (Surface with the weather shield Only).		
– Work Exclude : Piling Work, Piping Work & Wiring Work.		D
b) Waterproofing Work – for Roof Top Only : [(128' x 140') - (110' x 28')] x RM7.00/sq.ft.	RM 103,880.00	
c) WIP SATOGARE : 100' x 420' x 2 1/2 @ RM65.00/sq.ft.	RM 6,825,000.00	E
– Work Include : Forklift Loading Bay, 20' x 100' Awning, Staircase, Timber Door & Fire Door, Painting Work (Surface with the weather shield Only).		
– Work Exclude : Piling Work, Piping Work & Wiring Work.		F
d) Waterproofing Work – for Roof Top Only : 100' x 420' x RM7.00/sq.ft.	RM 294,000.00	G
16. WASH ROOM : 25' x 28' x 2 Storey @ RM135.00/sq.ft	RM 189,000.00	
– Work Include : Wall Tiles, Aluminium Window, PVC Door, Sanitary, Painting Work (Surface with the weather shield Only), Piping Work.		H
– Work Exclude : Piling Work, Piping Work & Wiring Work.		
17. 33 KV S.S.V. TNB SUB-STATION : 97' x 26' x 2 1/2 Storey @ RM70.00/sq.ft	RM 441,350.00	I
– Work Include : Internal Drain, Door & Window, Fencing & Gate.		

A	– Work Exclude : Piling Work & Wiring Work.	
	18. INTERNAL TNB SUB-STATION : 65' x 40' @ RM70.00/sq.ft.	RM 182,000.00
B	– Work Include : Internal Drain, Door & Window, Fencing & Gate. – Work Exclude : Piling Work & Wiring Work.	
	19. IWK SPECIFICATION TANK GWS EA1000	L/SUM
C	– Work Include : GWS EA1000 Complete Set, M&E Work, Civil & Structural Works. – Work Exclude : 9" Sewer Line & JWK Specification Sewer Manholes.	RM 515,000.00
D	20. TEMPORARY CANTEEN & OFFICE : 60' x 200' x 20 (h) @ RM33.00 – Work Include : Kitchen : Wall/Floor Tiles, basin Top, Piping Work. Office : Floor Tiles.	RM 396,000.00
E	Canteen Area : Cement Floor. a) Piling Work : 6" x 6" x 6 Meter (50 point x 3 pile/point)	RM 18,000.00
	21. TEMPORARY TOILET : 3' x 5' x 8 UNITS	L/SUM
F	– Work Include : Piping Work, Septic Tank, Wall Tiles, Floor Tiles, Sanitary. – Work Exclude : Piling Work, Wiring Work.	RM 52,000.00
	22. COMPLETE WORK SITE CLEARING PLUS INSURANCE	L/SUM
G	– Work Include : Excavator work for Acid & Chiller Pipe Area Only.	RM 160,000.00
H	23. FENCING, DRAIN WORKS & ROAD WORKS a) Type 'A' - 2' - x RM225.00/food run	RM 45,000.00
	– Work Include : Piling Work & Excavator Work	
I	c) Type 'A' - 651' - x RM175.00/food run	RM 113,925.00
	– Work Include : Excavator Work – Work Exclude : Piling Work	
	d) Type 'B' - 552' - x RM160.00/food run	RM 88,320.00

– Work Include : Excavator Work		A
e) TYPE ‘C’ – 3285’ X RM385.00/feet run	RM 1,264,725.00	
– Work Include : Excavator Work		B
f) TYPE ‘D’- 3103’ x RM390.00/foot run	RM 1,210,170.00	
– Work Include : Excavator Work		
g) 4’ U-DRAIN – 2612’ x RM192.00/foot run	RM 501,504.00	C
h) 2’ U-DRAIN – 5261’ x RM42.00/foot run	RM 220,962.00	
i) 3’ PIPE CULVERT – 1157’ x RM67.00/foot run	RM 77, 519.00	D
j) 18” PIPE CULVERT – 2457’ x RM22.00/foot run	RM 54,054.00	
k) CONCRETE ROAD : 294,791’ sq.ft. (as per attachment) X RM7.70/sq.ft	RM 2,269,890.70	E
l) PREMIX ROAD : (1162’ x 60”) = 69,720’ sq.ft. x RM6.50/sq.ft.	RM 453,180.00	
– Work Include : 300 mm C/Run, 4” Premix		F
– Work Exclude : Piling Work		

TOTAL PROJECT AMOUNT : RM49,684,079.20

[31] The defendant subsequently responded to the said quotation by issuing the PO. In the PO the items 1–23 are described as follows:

GREEN PROSPECT SDN BHD

Item	Description	ETA Quantity	Disc %	Unit Price	Amount (RM)	H
1	30000506 – 1. BLOCK D- a) Packing Area:203’x140’x3 1/2 storey @ RM65.00/sq.ft	1 LS	0.00	6,465,550.00	6,465,550.00	I

[2018] 6 MLJ		Green Prospect Sdn Bhd v King Ong Development Sdn Bhd (Hasnah Hashim JCA)				755
A	2	30000506 – b) Waterproofing Work – for Roof Top Only 203'x 40' @ RM7.00/sq.ft.	1 LS	0.00	198,940.00	198,940.00
B	3	3000506 – c) Glove Dipping Lines: 100' x 380' @ RM56.50/sq.ft.	1 LS	0.00	2,147,000.00	2,147,000.00
C	4	30000506 – d) Machine Footing: 4,320 foot run @ RM27.80	1 LS	0.00	120,096.00	120,096.00
D	5	30000506 – e) Machine Footing Side Drain: 4,680 foot run @ RM5.00	1 LS	0.00	23,400.00	23,400.00
E	6	30000506 – f) Box Culvert 4' : 200 foot run @ RM100.00	1 LS	0.00	20,000.00	20,000.00
F	7	30000506 – g) Marble: 38,000 sq.ft. @ RM7.00	1 LS	0.00	266,000.00	266,000.00
G	8	30000506 – h) Scrubber Room : 60' x 100' x 2 1/2 Storey @ RM65.00/sq.ft.	1 LS	0.00	975,000.00	975,000.00
H	9	30000506 – i) Waterproofing Work – for Roof Top only 60' x 100' x RM7.00/sq.ft	1 LS	0.00	42,000.00	42,000.00
I						

10	30000506 – 2. WASH ROOM : 33 1/2 x 65' @ RM135/sq.ft	1 LS	0.00	285,187.50	285,187.50	A
11	30000506 – 3. MSB ROOM : 40' x 65' @ RM70/sq.ft.	1 LS	0.00	182,000.00	182,000.00	B
12	30000506 – 4. CONCRETE SLAB : 20' x 65' @ RM31.00/sq.ft.	1 LS	0.00	40,300.00	40,300.00	C
13	30000506 – 5. CHILLER ROOM : 65' x 80' @ RM88 /sq.ft.	1 LS	0.00	457,600.00	457,600.00	D
14	30000506 – a) Waterproofing Work for Roof Top Only : 65' x 80' x RM7.00	1 LS	0.00	36,400.00	36,400.00	E
15	30000506 – 6. COMPOUNDING BLOCK : 65' x 160' x 2 Storey @ RM83/sq.ft.	1 LS	0.00	1,726,400.00	1,726,400.00	F
16	30000506 – 7. CHOLINE ROOM : 45' x 60' @ RM65.00/sq.ft.	1 LS	0.00	175,500.00	175,500.00	G
17	30000506 – a) Waterproofing Work for Roof Top Only 45' x 60' @ RM7.00/sq.ft.	1 LS	0.00	18,900.00	18,900.00	H
						I

A	18	30000506 – 8. TOH ROOM (Boiler Block) : 100' x 60' @ RM73.00/sq.ft.	1 LS	0.00	438,000.00	438,000.00
B	19	30000506 – 9. TNB SUB-STATION – 20' x 60' @ RM70.00/sq.ft.	1 LS	0.00	84,000.00	84,000.00
C	20	30000506 – 10. WASTE WATER UNDERGROUND TANK 20' x 40' x 10' (deep) @ RM3.10/gallons	1 LS	0.00	155,000.00	155,000.00
D						
E	21	30000506 – 11. 6 NOS WATER TANK FOOTING & I – BEAM STRUCTURE 40' x 60' x 50' (h)	1 LS	0.00	592,250.00	592,250.00
F	22	30000506 – 12. PACKING AREA : (128' x 140')-(110' x 28') x 3 1/2 Storey @ RM65.00/sq.ft	1 LS	0.00	3,376,100.00	3,376,100.00
G						
H	23	30000506 – b) Waterproofing Work – for Roof Top Only (128 x 140')-(110' x 28') x RM7/sq.ft	1 LS	0.00	103,880.00	103,880.00

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[32] Even though the PO had stated the quantity as '1LS' nevertheless both the quotation and the PO expressly stated the following:

Suggestion for item 1–23 any different amount on the job, will be re-measured again ...

[33] There were additional works involved. For the works as per the PO and additional works the plaintiff charged the defendant based on the actual work done even though the words 'LS' or 'lump sum' were stated. Based on the documents issued by the plaintiff adduced as evidence the parties had in fact re-measured the works done. Progress payments were also made to the plaintiff and this was not disputed.

A

B

[34] The defendant's witness ('SD1') was the person who prepared the PO and had explained in his witness statement that the quotation was an estimate provided by the plaintiff based on rough plans drawn. It identified the items, quantities, rates and estimated value of works. The PO was issued on estimation of the quantities of work and the parties had agreed that a final re-measurement of the quantities of work should be conducted to ascertain the value of work done. The PO issued by YTY Industry Sdn Bhd should not have been considered as there was no evidence that the works in the said purchase order for a different factory were similar to the works under this appeal.

C

D

THE QS REPORTS

[35] Before the commencement of this suit the defendant had appointed a QS to calculate the works done and completed to ascertain the amount due to the plaintiff, the defendant's QS conducted the re-measurement of the works and concluded that the plaintiff had been overpaid for works done.

E

[36] The report of the QS dated September 2016 stated that the works was on a re-measurement basis. The plaintiff had also appointed a QS. However, the plaintiff's QS did not conduct a physical re-measurement. Thus, we are of the view that since the defendant's QS had physical inspected the works the said QS and his Report must be considered reliable and credible.

F

G

[37] In our judgment what was contemplated was that from the very beginning the parties had agreed to a re-measurement contract. Therefore, the works completed must be measured before any payments are made. Based on both oral and documentary evidence the contract is clearly not a lump sum contract, in view of the provision for progress payments (re: *Ming & Co v Leong Ping Ching*).

H

[38] In *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 the respondent (the contractor) was at all relevant times the building contractor employed by the appellant (the developer) to build six units of three-storeyed shop houses at an agreed cost of \$223,000. The agreement between the parties was in writing. It was clear from the terms that the intention of the parties to the agreement was the construction of the project as a whole. The shop houses were not meant to be built one by one. The site was to be prepared in one operation and after

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- A its preparation, the piling work was to be commenced for all six houses. The construction was then to proceed by continuous work and the houses were expected to be constructed and ready for occupation at the same time. The payment for the construction by the usual process of progress payments was made dependent upon the completion of the several stages of the entire construction as set out in the particular clause relating to the progress payments.
- B

[39] Chang Min Tat FJ, delivering the judgment of the Federal Court, said:

- C This contract is clearly not a lump sum contract, in view of the provision for progress payments: *Ming & Co v Leong Ping Ching* [1964] MLJ 312. The contractor had however claimed under a lump sum or entire contract. This on a proper construction of the contract must be regretted. However, the defence had not relied on any contention that a claim under a lump sum contract was not maintainable.
- D The case was fought out on the basis of a claim for quantum meruit on a contract which was not for a lump sum. The claim therefore for work done and for the cost of extras must succeed. But on a quantum meruit, the claim which was allowed for loss of profits cannot succeed and to this extent the appeal is allowed.

- E [40] We are of the view that the quotation and the PO formed the foundation of the contractual relationship between the plaintiff and the defendant. The presence of the words 'P/s: Suggestion for item 1–23 any different amount on the job, will be re-measured again' in both the documents cemented the re-measurement arrangement agreed to by the parties. The contract is clearly not a lump sum contract in view of the progress payments made as well the written statements found in the quotation, POs and other documents confirmed by the defendant's QS.
- F

- G [41] In the circumstances we find that the learned judge had fundamentally erred when he failed to consider the contemporaneous evidence and the surrounding circumstances as well as totally disregarding the defendant's QS report. The learned judge erred when he failed to consider that the parties had throughout the duration of the contract regarded the contract to be on re-measurement basis. Furthermore, the plaintiff failed to adduce evidence to challenge or rebut the re-measurement findings by the defendant's QS.
- H

CONCLUSION

- I [42] Had the learned High Court judge considered the evidence in their proper perspective he could not have come to the conclusion that the contract is a lump sum contract.

[43] In conclusion after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[44] For the foregoing reasons, we unanimously allowed the appeal with costs. We set aside the High Court judgment. As for costs, we awarded a sum of RM60,000 here and below to the appellant to be paid by the respondent. We also ordered that the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Afq Mohamad Noor

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